

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRIS ALLISON, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

vs.

GDS HOLDINGS LIMITED, WILLIAM
WEI HUANG, and DANIEL NEWMAN,

Defendants.

Case No. 1:18-cv-06960

MARIA M. QUERI, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

vs.

GDS HOLDINGS LIMITED, WILLIAM
WEI HUANG, and DANIEL NEWMAN,

Defendants.

Case No. 1:18-cv-08810

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION OF MARIA M. QUERI FOR CONSOLIDATION OF RELATED ACTIONS,
APPOINTMENT AS LEAD PLAINTIFF AND APPROVAL OF LEAD COUNSEL**

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Maria M. Queri (“Queri”) respectfully submits this Memorandum of Law in support of her motion, pursuant to Section 21D(a)(3) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. § 78u-4(a)(3), as amended by the Private Securities Litigation Reform Act of 1995 (the “PSLRA”) and Fed. R. Civ. P. 42, for an Order: (1) consolidating the above-captioned related actions (the “Related Actions”); (2) appointing Queri as Lead Plaintiff on behalf of all persons who purchased or otherwise acquired the securities of GDS Holdings Limited (“GDS”) between November 2, 2016 and July 31, 2018, both dates inclusive (the “Class Period”); and (3) approving proposed Lead Plaintiff’s selection of Pomerantz LLP (“Pomerantz”) as Lead Counsel for the Class.

PRELIMINARY STATEMENT

The Complaints in the Related Actions allege that during the Class Period, the Defendants defrauded investors, in violation of the federal securities laws, by misrepresenting GDS’s business and operations. GDS investors, including Queri, incurred significant losses following the publication of a report by Blue Orca Capital (“Blue Orca”), on July 31, 2018, alleging, *inter alia*, that “GDS is borrowing crippling amounts of debt to enrich insiders by acquiring data centers from undisclosed related parties which are not nearly as valuable as the Company claims” and “is inflating the size of its service area, its utilization rates and therefore its reported revenues and EBITDA.” Following the publication of the Blue Orca report, GDS’s share price fell sharply, damaging Queri and other investors.

Pursuant to the PSLRA, the Court is to appoint as lead plaintiff the movant that possesses the largest financial interest in the outcome of the action and that satisfies the requirements of Fed. R. Civ. P. 23. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). Queri, having incurred a loss of approximately \$809 in connection with her Class Period purchases of GDS securities, believes that she has the largest financial interest in the relief sought in this action.

Beyond her considerable financial interest, Queri also meets the applicable requirements of Rule 23 because her claims are typical of absent class members and because she will fairly and adequately represent the interests of the Class.

In order to fulfill her responsibilities as lead plaintiff and vigorously prosecute this action on behalf of the Class, Queri has selected Pomerantz as Lead Counsel for the Class. Pomerantz is a nationally-recognized securities class action firm that has recovered billions of dollars on behalf of defrauded investors, and recently secured a recovery of \$3 billion on behalf of investors in the securities of Petrobras, the fifth largest class action settlement ever achieved in the United States. Based in New York, Pomerantz has offices in Chicago, Los Angeles, and Paris, France.

Accordingly, Queri respectfully requests that the Court enter an order appointing her as Lead Plaintiff and approving her selection of Pomerantz as Lead Counsel

Consolidation is appropriate under Fed. R. Civ. P. 42(a) where actions involve common questions of law or fact. Here, the Related Actions are both putative class actions alleging violations of the federal securities laws by the same Defendants occurring during overlapping Class Periods and arising from the same alleged fraudulent misconduct. As such, the Related Actions involve common questions of both law *and* fact, and consolidation is plainly warranted.

Accordingly, based on her significant financial interest and her commitment to overseeing this litigation, Queri respectfully requests that the Court enter an order appointing her as Lead Plaintiff and approving her selection of Pomerantz as Lead Counsel.

STATEMENT OF FACTS

GDS purports to be a leading developer and operator of high-performance data centers in China. The Company is headquartered in Shanghai, China.

On November 2, 2016, GDS conducted an initial public offering (the “IPO”) of American depositary shares (“ADSs”) on the NASDAQ Global Market (“NASDAQ”). Since the IPO, GDS ADSs have traded on the NASDAQ under the ticker symbol “GDS”.

Throughout the Class Period, Defendants made materially false and misleading statements regarding the Company’s business, operational and compliance policies. Specifically, Defendants made false and/or misleading statements and/or failed to disclose that: (i) GDS had assumed significant levels of debt in order to enrich insiders by acquiring data centers from related parties; (ii) GDS had overstated the value of a number of its data centers; (iii) GDS was inflating the size of its service area, utilization rates, reported revenues, and EBITDA; and (iv) as a result, GDS’s public statements were materially false and misleading at all relevant times.

On July 31, 2018, Blue Orca published a report alleging, *inter alia*, that “GDS is borrowing crippling amounts of debt to enrich insiders by acquiring data centers from undisclosed related parties which are not nearly as valuable as the Company claims.” The Blue Orca report further asserted that “GDS is inflating the size of its service area, its utilization rates and therefore its reported revenues and EBITDA.”

On this news, GDS’s ADS price fell \$13.42 per share, or over 38%, to close at \$21.83 per share on July 31, 2018. As a result of Defendants’ wrongful acts and omissions, and the precipitous decline in the market value of the Company’s securities, Queri and other Class members have suffered significant losses and damages.

ARGUMENT

I. THE RELATED ACTIONS SHOULD BE CONSOLIDATED

Consolidation of related cases is appropriate, where, as here, the actions involve common questions of law and fact, and therefore consolidation would avoid unnecessary cost, delay and overlap in adjudication:

Where actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters at issue in the actions; it may order all the actions consolidated; and it may make such order concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Fed. R. Civ. P. 42(a). *See also* Manual for Complex Litigation (Third), § 20.123 (1995).

Consolidation is appropriate when the actions before the court involve common questions of law *or* fact. *See* Fed. R. Civ. P. 42(a); *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) (citing *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284 (2d Cir. 1990)).

The Related Actions at issue here clearly involve common questions of law *and* fact. Each action was brought against GDS and the same defendants in connection with violations of the federal securities laws. Accordingly, the Related Actions allege substantially the same wrongdoing—namely that the Defendants issued materially false and misleading statements and omissions that artificially inflated the price of the GDS's securities and subsequently damaged the Class Members when the price of GDS securities plunged as the truth emerged. Consolidation of the Related Actions is therefore appropriate. *See Bassin v. Decode Genetics, Inc.*, 230 F.R.D. 313, 315 (S.D.N.Y. 2005) (consolidation of securities class actions is particularly appropriate in the context of securities class actions where the complaints are based on the same statements and the defendants will not be prejudiced); *In re GE Sec. Litig.*, No. 09 Civ. 1951 (DC), 2009 U.S. Dist. LEXIS 69133, at *5 (S.D.N.Y. July 29, 2009) (“Consolidation promotes judicial convenience and avoids unnecessary costs to the parties.”); *In re Tronox, Inc. Sec. Litig.*, 262 F.R.D. 338, 344 (S.D.N.Y. 2009) (consolidating securities class actions); *Blackmoss Invs., Inc. v. ACA Capital Holdings, Inc.*, 252 F.R.D. 188, 190 (S.D.N.Y. 2008) (same).

II. QUERI SHOULD BE APPOINTED LEAD PLAINTIFF

Queri should be appointed Lead Plaintiff because, to her knowledge, Queri has the largest financial interest in the Action and otherwise satisfies the requirements of Rule 23. The PSLRA directs courts to consider any motion to serve as lead plaintiff filed by class members in response to a published notice of the class action and to do so by the later of (i) 90 days after the date of publication, or (ii) as soon as practicable after the Court decides any pending motion to consolidate. *See* 15 U.S.C. § 78u-4(a)(3)(B)(i) & (ii).

Further, under 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I), the Court is directed to consider all motions by plaintiffs or purported class members to appoint lead plaintiff filed in response to any such notice. Specifically, the Court “shall” appoint the presumptively “most adequate plaintiff” to serve as lead plaintiff and shall presume that plaintiff is the person or group of persons, that:

(aa) has either filed the complaint or made a motion in response to a notice . . . ;

(bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and

(cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

As set forth below, Queri satisfies all three of these criteria and thus is entitled to the presumption that she is the most adequate plaintiff of the Class and, therefore, should be appointed Lead Plaintiff for the Class.

A. Queri is Willing to Serve as a Class Representative

On August 2, 2018, counsel for the plaintiff in the first of the Related Actions to be filed caused a notice to be published over *PR Newswire* pursuant to Section 21D(a)(3)(A)(i) of the PSLRA, which announced that litigation had been filed against Defendants and which advised investors in GDS securities that they had until October 1, 2018, to file a motion to be appointed

as lead plaintiff. *See* Declaration of J. Alexander Hood II in Support of Motion (“Hood Decl.”), Ex. A. Queri has filed the instant motion pursuant to the Notice, and she has attached a Certification attesting that she is willing to serve as a representative for the Class and to provide testimony at deposition and trial, if necessary. *See id.*, Ex. B. Accordingly, Queri satisfies the first requirement to serve as Lead Plaintiff of the Class.

B. Queri Has the “Largest Financial Interest” in the Action

The PSLRA requires a court to adopt a presumption that “the most adequate plaintiff . . . is the person or group of persons that . . . has the largest financial interest in the relief sought by the class.” 15 U.S.C. § 78u-4(a)(3)(B)(iii). To the best of its knowledge, Queri has the largest financial interest of any GDS investor seeking to serve as Lead Plaintiff. Courts frequently assess financial interest based upon the four factors articulated in the seminal case *Lax v. First Merchants Acceptance Corp.*: (1) the number of shares purchased during the class period; (2) the number of net shares purchased during the class period; (3) the total net funds expended during the class period; and (4) the approximate losses suffered. Nos. 97 C 2715 *et al.*, 1997 U.S. Dist. LEXIS 11866, at *17 (N.D. Ill. Aug. 6, 1997). In accord with other courts nationwide,¹ these *Lax* factors have been adopted and routinely applied by courts in the Second Circuit. *See, e.g., Chahal v. Credit Suisse Grp. AG*, 18-CV-2268 *et al.*, 2018 U.S. Dist. LEXIS 104185, at *12 (S.D.N.Y. June 21, 2018); *Nurlybaev v. ZTO Express (Cayman) Inc.*, 17-CV-06130 (LTS)(SN), 2017 U.S. Dist. LEXIS 187238, at *3 (S.D.N.Y. Nov. 13, 2017); *Pirelli Armstrong Tire Corp. v. LaBranche & Co., Inc.*, 229 F.R.D. 395, 404-05 (S.D.N.Y. 2004).

¹ *See e.g., In re Cendant Corp. Litig.*, 264 F.3d 201, 262 (3d Cir. 2001); *In re Olsten Corp. Sec. Litig.*, 3 F. Supp. 2d 286, 295 (E.D.N.Y. 1998); *accord In re Comverse Tech., Inc. Sec. Litig.*, No. 06-CV-1825 (NGG) (RER), 2007 U.S. Dist. LEXIS 14878, at *22-*25 (E.D.N.Y. Mar. 2, 2007).

During the Class Period, Queri: (1) purchased 69 shares of GDS securities; (2) expended \$3,115 on purchases of GDS securities; (3) retained all of her shares of GDS securities; and (4) incurred losses of \$809 in connection with her transactions in GDS securities during the Class Period. *See* Hood Decl., Ex. C. To the extent that Queri possesses the largest financial interest in the outcome of this litigation, she is the presumptive “most adequate” plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb).

C. Queri Otherwise Satisfies the Requirements of Rule 23

Section 21D(a)(3)(B)(iii)(I)(cc) of the PSLRA further provides that, in addition to possessing the largest financial interest in the outcome of the litigation, a lead plaintiff must “otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure.” Rule 23(a) provides that a class action may proceed if the following four requirements are satisfied:

(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

In making its determination that a lead plaintiff satisfies the requirements of Rule 23, the Court need not raise its inquiry to the level required in ruling on a motion for class certification. Instead, “[t]he parties moving for lead plaintiff are only required to make a *prima facie* showing that they meet [the requirements of] Rule 23”. *Aude v. Kobe Steel, Ltd.*, 17-CV-10085, 2018 U.S. Dist. LEXIS 57591, at *8 (S.D.N.Y. Apr. 4, 2018); *see also Kaplan v. Gelfond*, 240 F.R.D. 88, 94 (S.D.N.Y. 2007) (“[A]t this stage of the litigation, only a preliminary showing of typicality and adequacy is required.”) Moreover, “[t]ypicality and adequacy of representation are the only provisions relevant to a determination of lead plaintiff under the PSLRA.” *In re Oxford Health Plans, Inc. Sec. Litig.*, 182 F.R.D. 42, 49 (S.D.N.Y. 1998); *see also Aude*, 2018 U.S. Dist. LEXIS 57591 at *8. Here, the Complaints in the Related Actions sufficiently plead

Rule 23(a)(1) numerosity and Rule 23(a)(2) common questions in a manner common to all putative Class members, including Queri.

The typicality requirement of Fed. R. Civ. P. 23(a)(3) “is satisfied if ‘each class member’s claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant’s liability.’” *In re Orion Secs. Litig.*, 08 Civ. 1328 (RJS), 2008 U.S. Dist. LEXIS 55368, at *12 (S.D.N.Y. July 7, 2008) (quoting *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 291) (2d Cir. 1992)). “[T]he claims of the class representative need not be identical those of all members of the class. ‘[T]he typicality requirement may be satisfied even if there are factual dissimilarities or variations between the claims of the named plaintiffs and those of other class members, including distinctions in the qualifications of the class members.’” *Janbay v. Canadian Solar, Inc.*, 272 F.R.D. 113, 120 (S.D.N.Y. 2010) (quoting *Bishop v. N.Y. City Dep’t of Hous. Pres. & Dev.*, 141 F.R.D. 229, 238 (2d Cir. 1992)).

Queri’s claims are typical of those of the Class. Queri alleges, as do all Class members, that Defendants violated the federal securities laws by making false or misleading statements of material facts and/or omitting to disclose material facts concerning GDS. Queri, as did all members of the Class, purchased GDS securities during the Class Period at prices alleged to have been artificially inflated by Defendants’ misrepresentations or omissions, and was damaged upon the disclosure of those misrepresentations and/or omissions that drove the price of GDS securities downward. These shared claims, which are based on the same legal theory and arise from the same events and course of conduct as the Class’s claims, satisfy the typicality requirement of Rule 23(a)(3).

The adequacy of representation requirement of Rule 23(a)(4) is satisfied where “(1) class counsel is qualified, experienced, and generally able to conduct the litigation; (2) there is no

conflict between the proposed lead plaintiff and the members of the class; and (3) the proposed lead plaintiff has a sufficient interest in the outcome of the case to ensure vigorous advocacy.” *Foley v. Transocean Ltd.*, 272 F.R.D. 126, 131 (S.D.N.Y. 2011); *see also Dookeran v. Xunlei Ltd.*, 18-cv-467 (RJS) *et al.*, 2018 U.S. Dist. LEXIS 62575, at *6 (S.D.N.Y. Apr. 12, 2018) (same).

As set forth in greater detail below, in Pomerantz, Queri has retained counsel highly experienced in vigorously and efficiently prosecuting securities class actions such as this action, and submits its choice of Pomerantz to the Court for approval pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(v). There is no evidence of antagonism or conflict between Queri’s interests and the interests of the Class. Queri has submitted a signed Certification declaring her commitment to protect the interests of the Class (*see Hood Decl., Ex. B*), and the significant losses incurred by Queri demonstrate that she has a sufficient interest in the outcome of this litigation to ensure vigorous adequacy.

III. LEAD PLAINTIFF’S SELECTION OF COUNSEL SHOULD BE APPROVED

The PSLRA vests authority in the lead plaintiff to select and retain lead counsel, subject to Court approval. *See* 15 U.S.C. § 78u-4(a)(3)(B)(v). The Court should only interfere with lead plaintiff’s choice if necessary to “protect the interests of the class.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa). *See also Kaplan v. S.A.C. Capital Advisors, L.P.*, 311 F.R.D. 373, 383 (S.D.N.Y. 2015) (“The PSLRA evidences a strong presumption in favor of approving a properly-selected lead plaintiff’s decisions as to counsel selection and counsel retention.”) (quoting *Varghese v. China Shenghuo Pharm. Holdings, Inc.*, 589 F. Supp. 2d 388, 398 (S.D.N.Y. 2008)). *See also In re Molson Coors Brewing Co. Sec. Litig.*, 233 F.R.D. 147, 151 (D. Del. 2005).

Here, Queri has selected Pomerantz as Lead Counsel for the Class. Pomerantz is highly experienced in the area of securities litigation and class actions, and has successfully prosecuted

numerous securities litigations and securities fraud class actions on behalf of investors, as detailed in the firm's resume. *See* Hood Decl., Ex. D. Pomerantz is a premiere firm in the area of securities litigation based in New York, with offices in Chicago, Los Angeles, and Paris, France. For more than 75 years, Pomerantz has represented defrauded investors. As lead counsel in *In re Petrobras Securities Litigation*, No. 14-cv-09662 (S.D.N.Y.), Pomerantz recently secured a recovery of \$3 billion on behalf of investors in the securities of Petrobras, the largest settlement ever in a class action involving a foreign issuer and the fifth largest class action settlement ever achieved in the United States. Courts in this judicial district, the Second Circuit, and throughout the country have recognized Pomerantz's qualifications to serve as class counsel, and Pomerantz has recently been appointed lead counsel in actions including *Brady v. Top Ships Inc.*, 2:17-cv-4987 (E.D.N.Y.); *Schiro v. CEMEX, S.A.B. de C.V.*, 1:18-cv-2352 (S.D.N.Y.); *Smith v. Antares Pharma, Inc.*, 3:17-cv-8945 (D.N.J.); and *Kessman v. Myriad Genetics, Inc.*, No. 18-cv-336 (D. Utah).

As a result of Pomerantz's extensive experience in litigation involving issues similar to those raised in the instant action, Queri's chosen counsel have the skill, knowledge, expertise, and experience that will enable them to prosecute this action effectively and expeditiously. Thus, the Court may be assured that by approving Queri's selection of Pomerantz as Lead Counsel, the members of the class will receive the best legal representation available.

CONCLUSION

For the foregoing reasons, Queri respectfully requests that the Court issue an Order: (1) consolidating the Related Actions; (2) appointing Queri as Lead Plaintiff for the Class; and (3) approving her selection of Pomerantz as Lead Counsel for the Class.

Dated: October 1, 2018

Respectfully submitted,

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